No. _____

In The

Supreme Court of the United States

MARIN ALLIANCE FOR MEDICAL MARIJUANA and LYNNETTE SHAW,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When (1) the United States sues defendants in reliance on a classification made under a statutory scheme and (2) the defendants challenge the classification as unconstitutional on the ground that it lacks a rational basis, may the district court refuse to decide whether the *classification* has a rational basis but uphold its constitutionality on the ground that the *statutory scheme* has a rational basis?

2. Does the federal government's classification of marijuana as a Schedule I drug bear a rational relationship to a legitimate government interest?

LIST OF PARTIES

A list of parties to the proceeding in the court whose judgment is the subject of this petition appears below. Parties whom petitioners believe have no interest in the outcome of this petition are designated with an asterisk and will be the subject of a notice in accordance with Rule 12.6 of the Rules of the Supreme Court of the United States.

United States of America

Oakland Cannabis Buyers' Cooperative*

Jeffrey Jones*

Marin Alliance for Medical Marijuana

Lynnette Shaw

Ukiah Cannabis Buyer's Club*

Cherrie Lovett*

Marvin Lehrman*

Mildred Lehrman*

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PETITION FOR WRIT OF CERTIORARI

Petitioners Marin Alliance for Medical Marijuana and Lynnette Shaw (hereafter petitioners) respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The December 13, 2007 memorandum opinion of the United States Court of Appeals for the Ninth Circuit appears at page 1 of the Appendix and is unpublished. An unofficial report is available: *United States v. Oakland Cannabis Buyers' Coop.*, No. 05-16466, 2007 U.S. App. LEXIS 29132 (9th Cir. Dec. 13, 2007).[1]

The June 6, 2005 order of the United States District Court for the Northern District of California appears at page 7 of the Appendix and is unpublished.

[1] The memorandum opinion decided three consolidated cases. The case listed second in the Ninth Circuit's caption was petitioners' case, *United States v. Marin Alliance for Medical Marijuana*, No. 05-16547. The third was *United States v. Ukiah Cannabis Buyer's Club*, No. 05-16556. App. 1-2.

JURISDICTION

The Ninth Circuit[2] decided this case on December 13, 2007. A timely petition for rehearing was denied by the Ninth Circuit on March 14, 2008. The jurisdiction of this Court is invoked under 28 U.S.C.S. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In accordance with Rule 14.1(f) and Rule 14.1(i)(v) of the Rules of the Supreme Court of the United States, the constitutional provisions and statutes involved in the case are cited below and are set out verbatim in the appendix, at the pages indicated.

U.S. Const. amend. V: App. 44.

21 U.S.C.S. § 802: App. 44.

21 U.S.C.S. § 811: App. 45.

21 U.S.C.S. § 812: App. 48.

21 U.S.C.S. § 841: App. 52.

[2] For brevity's sake, this petition refers to the Court of Appeals below and other federal courts of appeals by their circuit names.

STATEMENT OF THE CASE

I. Procedural History

On January 9, 1998, the United States filed several civil complaints in the United States District Court for the Northern District of California. One of the complaints named petitioners as defendants; another named Oakland Cannabis Buyers' Cooperative (hereafter Oakland Cooperative) and Jeffrey Jones as defendants. The defendants were cannabis buyers' clubs and individuals whom the Government alleged were manufacturing and distributing marijuana in violation of the Controlled Substances Act, 21 U.S.C.S. § 801 *et seq.* (hereafter CSA). The complaints sought injunctive relief. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486-87 (2001) (hereafter *Oakland Cannabis*). The cases were consolidated and assigned to District Judge Charles R. Breyer.

On May 13, 1998, the district court issued a Memorandum and Order finding "a strong likelihood that defendants' conduct violates the Controlled Substances Act." The court indicated that it would issue a preliminary injunction against the defendants in each action. *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086 (N.D. Cal. 1998).

On May 19, 1998, the district court issued preliminary injunctions in all of the cases, enjoining the defendants from manufacturing and distributing marijuana. *See Oakland Cannabis*, 532 U.S. at 487 & n.1.

In October 1998, the district court "modified the preliminary injunction to empower the United States Marshal to seize the [Oakland] Cooperative's premises." *Oakland Cannabis*, 532 U.S. at 487. "Three days later, the District Court summarily rejected a motion by the Cooperative to modify the injunction to permit distributions that are medically necessary." *Id*. at 488.

Oakland Cooperative appealed the order denying its motion to modify the injunction.[3] The Ninth Circuit reversed, holding that "the medical necessity defense was a 'legally cognizable defense' that likely would apply in the circumstances." *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1114 (9th Cir. 1999). The Government petitioned for certiorari, which this Court granted. *United States v. Oakland Cannabis Buyers' Coop.*, 531 U.S. 1010 (2000).

On May 14, 2001, this Court reversed, holding that there is no medical necessity exception to the CSA's prohibitions on manufacturing and distributing marijuana. *Oakland Cannabis*, 532 U.S. at 494. The

[3] While that appeal was pending, the district court issued an order in petitioners' case on December 3, 1998, rejecting defendants' argument that the CSA's classification of marijuana in Schedule I was irrational and therefore unconstitutional. App. 38.

Court made clear that it was not deciding any constitutional question. *Id.* at 494 & n.7.

The case returned to the district court. On May 3, 2002, that court issued a Memorandum and Order granting the Government's motion for summary judgment and permanent injunctive relief. App. 20. The court rejected the defendants' various contentions, including arguments that the CSA, as applied to the defendants, "violates their Due Process rights under a rational-basis review" and that the Commerce Clause did not give Congress the power to prohibit defendants' intrastate manufacture and distribution of medical marijuana. App. 30-36.

On June 10, 2002, the district court filed a Memorandum and Order announcing that it would issue permanent injunctions. App. 11.[4] On the same day, the district court filed a "Judgment; Permanent Injunction" in which it entered judgment in favor of the Government and permanently enjoined petitioners from manufacturing and distributing marijuana; it also enjoined petitioner Lynnette Shaw from conspiring to violate the CSA. App. 9.

Petitioners and some of the other defendants appealed. The Ninth Circuit consolidated the cases. After briefing and oral argument, the Ninth Circuit

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[4] An unofficial report of the district court's Memorandum and Order is available. *United States v. Cannabis Cultivator's Club*, No. 98-00085 CRB, 2002 U.S. Dist. LEXIS 10660 (N.D. Cal. June 10, 2002).

vacated submission and ordered the parties to submit briefing addressing the relevance of *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003). The court then resubmitted the case. On June 18, 2004, the Ninth Circuit remanded the case "for the district court to reconsider after the Supreme Court has completed its action in *Raich*." *United States v. Marin Alliance for Medical Marijuana*, 372 F.3d 1047, 1048 (9th Cir. 2004).

On June 28, 2004, this Court granted certiorari in *Raich*. *Ashcroft v. Raich*, 542 U.S. 936 (2004). This Court announced its decision in *Raich* on June 6, 2005. *Gonzales v. Raich*, 545 U.S. 1 (2005). On the same day, the district court issued an Order in this case, stating that "[i]n light of the Supreme Court's opinion issued today, . . . the Court declines to reconsider its earlier rulings." App. 7.

Petitioners filed a notice of appeal on August 3, 2005. The defendants in two of the other cases appealed as well; the Ninth Circuit consolidated the cases. After briefing and oral argument, the Ninth Circuit issued a Memorandum on December 13, 2007, affirming the judgment. The Memorandum rejected, among other defenses, petitioners' arguments that the placement of marijuana in Schedule I of the CSA failed rational-basis review. App. 1.

Petitioners filed a petition for panel rehearing and rehearing en banc, which was denied on March 14, 2008. App. 42.

II. Facts

A. Origins of the Instant Case

In November 1996, California voters enacted Proposition 215, an initiative measure entitled the Compassionate Use Act ("CUA"), to permit seriously ill patients and their primary caregivers to possess and cultivate medical cannabis with the approval or recommendation of a physician. Cal. Health & Safety Code § 11362.5.[5]

To implement the will of California voters, petitioners in 1997 organized a cooperative to provide seriously ill patients with a safe and reliable source of medical cannabis. The cooperative worked closely with medical doctors and county, state and town officials. The cooperative was regularly visited and audited by police and fire department officials and updated its use permit annually. The director of the cooperative has been a licensed adult probation officer since 1993.

Between June 2, 1997, and October 24, 1997, federal agents posing as severely ill patients with physician recommendations for medical marijuana visited petitioners' facilities and, after showing what purported to be appropriate papers, procured marijuana from petitioners for medical use.

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[5] The CUA's provisions and purposes were described in this Court's opinion in *Gonzales v. Raich*, 545 U.S. 1, 5-6.

B. The Rapidly Changing Legal Status of Medical Marijuana Under State Laws

Twenty-four states and the District of Columbia have acted since 1996, or are in the process of acting (through voter initiative, legislation, or constitutional amendment), to legalize or decriminalize the use and distribution of marijuana for medicinal purposes. Twelve states currently have statutes in place which make it legal to use and distribute medical marijuana.[6] Only six states have scheduled marijuana in conformity with its federal Schedule I status. Marijuana has its own distinct schedule in thirty-nine states, while five others have placed it in either a Schedule V or a Schedule VI. *See* National Criminal Justice Association, *A Guide to State Controlled Substances Acts* (1991).

In addition to the twelve states that have fully legalized medical marijuana – Alaska, California, Colorado, Hawaii, Maine, Montana, New Mexico, Nevada, Oregon, Rhode Island, Vermont and Washington – many more states and the District of Columbia either have taken or are in the process of taking some action that would permit medical use of marijuana.[7] For example, in 2008, medical marijuana

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[6] No state which has legalized medical marijuana since 1996 has reversed that legalization.

[7] Arizona voters and the Virginia legislature have passed laws that would allow medical marijuana for patients with doctors' *prescriptions* rather than *recommendations*. Since the CSA's Schedule I classification of marijuana prevents doctors

(Continued on following page)

legalization or decriminalization is under consideration by state legislatures in Alabama, Kansas, Minnesota, Missouri and New Jersey. Voter initiatives on the subject will appear on November 2008 election ballots in Illinois and Michigan.

C. Evidence Demonstrating Currently Accepted Medical Use of Marijuana in the United States

Petitioners presented the district court with voluminous evidence demonstrating that there is currently accepted medical use of marijuana in the United States. The evidence was unchallenged by the Government. Examples of that evidence included:

* * *

1. Thousands of pages of scientific articles published in the leading and most well-respected medical journals in the United States which state that marijuana is a safe, effective, accepted therapeutic medicine.

2. Statements by medical organizations representing thousands of physicians stating that marijuana is a safe, effective, accepted therapeutic

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from prescribing marijuana, these laws are ineffective. In Connecticut, medical marijuana legislation passed by the legislature was vetoed by the governor. District of Columbia voters passed a medical marijuana initiative, but Congress acted to prevent its implementation.

medicine.[8] For example, The California Medical Board, which licenses and regulates over 120,000 physicians, has published procedures for its physicians to administer medical marijuana in treatment. Another example is an amicus brief filed by the California Medical Association, which stated:

> "At the time of its introduction, the CSA classified marijuana as a drug having no accepted medical use. Times change. The CSA classification is no longer a statement of science, but a hollow phrase bereft of factual support. It should have collapsed upon itself long before the citizens of California adopted Proposition 215."[9]

3. Declarations by numerous patients suffering from debilitating and life-threatening illnesses and diseases, stating that (1) working closely with their

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[8] As Chief Judge Alex Kozinski of the Ninth Circuit has noted, "A surprising number of health care professionals and organizations have concluded that the use of marijuana may be appropriate for a small class of patients who do not respond well to, or do not tolerate, available prescription drugs." *Conant v. Walters*, 309 F.3d 629, 640-41 (9th Cir. 2002) (Kozinski, J., concurring).

[9] The following are among the numerous organizations (in addition to those mentioned in the text) that have stated their acceptance of the use of medical marijuana in treatment: the American Public Health Association (Governing Council Resolution #9513, November 1995); the National Institutes of Health (1997); the Lymphoma Foundation of America (resolution in January 1997); and the American Academy of Family Physicians (AAFP Reference Manual: Selected Policies on Health Issues, 2001).

physicians, they had tried other prescription medications which proved to be ineffective or to have intolerable side effects; and (2) marijuana proved to be a safe, effective, therapeutic medicine in the treatment of their illnesses.

4. Evidence that, for several decades, the United States Government itself has continuously distributed marijuana to a small number of seriously ill patients for medical purposes. The National Institute on Drug Abuse (NIDA) Marijuana Project is administered by the Drug Enforcement Administration (DEA) and NIDA, which is part of the Department of Health and Human Services.

5. The legislative history of the CSA, in which Congress acknowledged, when it initially classified marijuana in Schedule I, that it lacked reliable information about marijuana; Congress provided for the establishment of a presidential commission on marijuana. The National Commission on Marihuana and Drug Abuse was thus created; it conducted over 50 studies and surveys of opinions of professional experts, district attorneys, judges, probation officers, clinicians, and public officials.

The commission, in a 1972 report published as *Marihuana: A Signal of Misunderstanding*, concluded that marijuana should be fully decriminalized and stated:

> Marijuana's relative potential for harm to the vast majority of individual users and its actual impact on society does not justify a

> social policy designed to seek out and firmly punish those who use it. . . . No significant physical, biochemical, or mental abnormalities could be attributed solely to their marijuana smoking. . . . Some of these original fears were unfounded and that others were exaggerated has been clear for many years. Yet, many of these early beliefs continue to affect contemporary public attitudes and concerns.

6. Evidence that the Attorney General, through the authority vested in the Administrator of the DEA, has taken up to 22 years to deny an application to reschedule marijuana.

7. In 1988, the DEA's Administrative Law Judge Francis L. Young conducted an exhaustive study and submitted a 40-plus-page report examining the scientific evidence concerning the proper classification of marijuana under the CSA. He concluded:

> There are those who, in all sincerity, argue that the transfer of marijuana to Schedule II will send a signal that marijuana is "OK" generally for recreational use. This argument is specious. It presents no valid reason for refraining from taking an action required by law in light of the evidence. If marijuana should be placed in Schedule II, in obedience to the law, then that is where marijuana should be placed, regardless of misinterpretation of the placement by some. . . .

> The evidence in this record clearly shows that marijuana has been accepted as capable of relieving the distress of great numbers of very ill people, and doing so with safety under medical supervision. It would be unreasonable, arbitrary and capricious for DEA to continue to stand between those sufferers and the benefits of this substance in light of the evidence in this record.
>
> The administrative law judge recommends that the Administrator conclude that the marijuana plant considered as a whole has a currently accepted medical use in treatment in the United States, that there is no lack of accepted safety for use of it under medical supervision and that it may lawfully be transferred from schedule I to schedule II. The judge recommends that the Administrator transfer marijuana from Schedule I to Schedule II.

Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of Administrative Law Judge, In The Matter Of Marijuana Rescheduling Petition, Docket No. 86-22, U.S. Department of Justice, Drug Enforcement Administration (Sept. 6, 1988), *cited in Seeley v. State*, 940 P.2d 604, 614 (Wash. 1997).

8. Amicus briefs and letters from California's attorney general and from district attorneys and police chiefs of various California cities and counties, stating that marijuana is a safe, effective, accepted therapeutic medicine. The state, city and county

amicus briefs and letters also state that regulating the controlled use of medical marijuana in those jurisdictions (1) improves the health and welfare of their residents and (2) improves public safety by controlling medicinal dosage quality and obviating the need for black-market, street-level dealing.

9. Documentation of the DEA hearings on Marinol and rescheduling of that drug to Schedule III. Upon application by a large pharmaceutical company (Unimed), the DEA acknowledged the medically accepted use of Marinol, an exact synthesis of the most active ingredient in marijuana.

10. Other medical evidence, such as:

a. A 1991 survey of oncologists, performed by the American Society of Clinical Oncology, which comprises approximately 80 percent of the 5,000-plus board-certified oncologists, stating:

> Marijuana has been shown to be effective in treating emesis associated with cancer chemotherapy, but its use is currently prohibited by law.
>
> In September of 1988 after two years of administrative hearings, DEA administrative law judge, Francis Young, issued a recommendation in favor of rescheduling marijuana. He ruled that the appropriate standard for current acceptance is identical to the one established for a successful defense in medical malpractice cases, which requires only that the medical malpractice at

> issue be accepted by "a respectable minority" of physicians. . . . [In that case] the court remarked "we (the court) are not physicians and we have no light on the subject except such as is shed by the testimony of physicians. . . ."
>
> A surprising proportion of respondents (44%) said they had recommended marijuana to at least one patient.
>
> . . . [T]his survey demonstrates that oncologists' experience with the medical use of marijuana is more extensive and their opinions of it are more favorable, than the regulatory authorities appear to have believed. It appears that current regulations create the somewhat anomalous situation that a substantial fraction of all practicing oncologists, at least occasionally, commit an act – i.e., counseling a patient to acquire and use a controlled substance – that constitutes a crime that at least in principle could lead to the revocation of their license.

b. Dr. Lester Grinspoon, M.D., chairman of the Department of Psychiatry of Harvard Medical School, author of 154 scholarly articles and 13 books, summarized the published scientific evidence establishing the efficacy of cannabis as an anti-emetic for cancer chemotherapy, as a retardant to reduce intraocular pressure experienced by glaucoma sufferers, as an anticonvulsant to control seizures, as an analgesic to control pain, and as an appetite stimulant to combat the AIDS wasting syndrome.

c. Dr. Marcus Conant, M.D., who has treated 5000 HIV-infected men and women, stated:

> In my practice, marijuana has been of greatest benefit to patients with wasting syndrome. I do not routinely recommend marijuana to my patients, nor do I consider it the first line of defense against AIDS-related symptoms. However, for some patients, marijuana proves to be the *only* effective medicine for stimulating appetite and suppressing nausea, thus allowing the AIDS patient to recover lost body mass and become healthier.

d. *Marijuana and Medicine*, a 1999 report prepared by the National Academy of Sciences, Institute of Medicine, at the request of the White House Office of National Drug Control Policy. The report concluded that cannabis may be the best alternative available for some medical patients.

* * *

Compelling new evidence which was not before the courts below but which may be considered in a reevaluation of marijuana's currently accepted medical use continues to be discovered. One example: The American College of Physicians (ACP) is the largest medical-specialty organization in the United States, representing over 100,000 physicians and medical specialists. In 2008, ACP published a position paper on marijuana as medicine. Among the policy positions stated in that paper were:

> ACP urges review of marijuana's status as a schedule I controlled substance and its reclassification into a more appropriate schedule, given the scientific evidence regarding marijuana's safety and efficacy in some clinical conditions.
>
> . . . ACP strongly supports exemption from federal criminal prosecution; civil liability; or professional sanctioning, such as loss of licensure or credentialing, for physicians who prescribe or dispense medical marijuana in accordance with state law. Similarly, ACP strongly urges protection from criminal or civil penalties for patients who use medical marijuana as permitted under state laws.

American College of Physicians, *Supporting Research into the Therapeutic Role of Marijuana* (2008), http://www.acponline.org/advocacy/where_we_stand/other_issues/medmarijuana.pdf.

III. Jurisdiction in Court of First Instance

The district court had jurisdiction under 21 U.S.C.S. § 882(a), 28 U.S.C.S. § 1331, and 28 U.S.C.S. § 1345.

REASONS FOR GRANTING THE PETITION

I. Both the District Court and the Court of Appeals Failed to Decide the Question Presented by Petitioners' Constitutional Defense: Whether or Not the Federal Government's Classification of Marijuana as a Schedule I Drug Has a Rational Basis.

A. The Disputed Classification

The district court found that petitioners and several other defendants violated the CSA by distributing marijuana and possessing marijuana with the intent to distribute. App. 36-37. As the district court explained:

> The statute at issue here – the CSA – places drugs into five schedules, which impose different restrictions on access to the drugs. Congress placed marijuana in Schedule I, the most restrictive schedule. A Schedule I drug (1) has a high potential for abuse, (2) has no currently accepted medical use in treatment in the United States, and (3) has a lack of accepted safety for use of the drug . . . under medical supervision. *See* 21 U.S.C. § 812(b)(1). The CSA permits the Attorney General "to reschedule a drug if he finds that it does not meet the criteria for the schedule to which it has been assigned." *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1133 (D.C. Cir. 1994) (citing 21 U.S.C. § 811(a)). The Attorney General has delegated this authority to the Administrator of the DEA, who in turn has adopted guidelines

> for determining if a drug has currently accepted medical use in the United States. Members of the public may petition the Administrator to reschedule a particular drug, including marijuana.

App. 32.

Over the years since the CSA was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, the DEA has rejected several petitions requesting that it move marijuana from Schedule I to Schedule II or Schedule III, which would allow doctors to prescribe it for therapeutic purposes. *Gonzales v. Raich*, 545 U.S. 1, 10-12, 15 & n.23 (2005); *Alliance for Cannabis Therapeutics*, 15 F.3d at 1132-34.

B. Rational Basis Scrutiny: Legal Background

The Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit statutes that lack a rational relationship to a legitimate government interest. *See, e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 589-90, 603 (1987) (congressional enactment regarding eligibility for AFDC benefits was challenged as violating Fifth Amendment due process; "the standard of review here is whether 'Congress had a rational basis' for its decision"); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 69, 82-83 (1978) (economic regulation generally is "upheld

absent proof of arbitrariness or irrationality on the part of Congress"); *Kimmel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose.").

As with congressional enactments, actions of Executive Branch officials and agencies, such as the Attorney General and the DEA, violate the Due Process Clause of the Fifth Amendment if they lack a rational basis. *See, e.g., Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1979) (upholding Attorney General's regulation against due process challenge because it had rational basis).

Thus, the classification of marijuana as a Schedule I drug, which originated with Congress and has been perpetuated by the Executive Branch, is subject to challenge under the Due Process Clause of the Fifth Amendment as lacking a rational relationship to a legitimate government interest.

C. The District Court Refused to Decide Whether or Not the Classification at Issue Has a Rational Basis; Instead, It Informed Petitioners that Their Remedy Was to Petition the Executive Branch to Change the Classification.

The 2005 district court order from which petitioners appealed stated simply that the court "declines to reconsider its earlier rulings." App. 7. The rulings the district court declined to reconsider were its May 3, 2002, Memorandum and Order granting the Government's motion for summary judgment (App. 20) and the permanent injunctive relief it issued against petitioners and other defendants on June 10, 2002 (App. 9).

Three paragraphs of the district court's memorandum addressed petitioners' argument that the classification at issue lacked a rational basis and thus, as applied to petitioners, violated due process. After correctly stating that it must uphold a statute if it is rationally related to a legitimate government interest, the court described the CSA's classification scheme and noted that "Congress placed marijuana in Schedule I, the most restrictive schedule." App. 32. After noting that the DEA, under authority delegated by the Attorney General, has authority to reschedule a drug and that members of the public may petition for such rescheduling (App. 32; *supra* pages 18-19), the district court stated:

> The Court must consider this entire statutory scheme in determining whether

> there is a rational basis for the CSA's prohibition on the manufacture and distribution of marijuana for any purpose. In light of the available statutory procedure for reviewing the appropriateness of the current classification of marijuana, the Court cannot conclude that the CSA's prohibition on the distribution of marijuana is not rationally related to a legitimate government purpose, namely, to limit the distribution of drugs with high potential for abuse. *Defendants' challenge to the appropriateness of the classification of marijuana must be made to the DEA Administrator, not this district court.* To hold otherwise would allow defendants and others to make an "end run" around the process Congress implemented to ensure that drugs are properly classified.

App. 33 (emphasis added).

The district court thus completely ignored the voluminous, persuasive evidence produced by petitioners in order to disprove that marijuana has "no currently accepted medical use in treatment in the United States," one of the three requirements for Schedule I classification (21 U.S.C.S. § 812(b)(1)), and to prove that the classification therefore lacks a rational basis. Instead, the district court told petitioners, in effect, to go to the DEA and exhaust their administrative remedies.

What the district court apparently failed to appreciate is that the instant case is *not* a lawsuit by petitioners seeking a declaration that the CSA's

classification of marijuana in Schedule I is unconstitutional. If this *were* such a case, the district court's holding that the DEA is the proper forum would be justified, since the DEA's ruling on a petition for reclassification is subject to review by a court of appeals. An example of that kind of review is *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131 (D.C. Cir. 1994), which the district court cited (App. 32).

In the instant case, however, petitioners are *defendants*, sued by the Government in the district court. Petitioners did not choose the district court as the forum for this case; the Government did. Petitioners were entitled to defend themselves by asserting the unconstitutionality of the law the Government sought to enforce against petitioners. *See United States v. Szoka*, 260 F.2d 516, 527-28 (6th Cir. 2001) ("When the FCC institutes an in rem forfeiture action – and not an administrative action – against a microbroadcaster, the broadcaster can raise and the district court can consider constitutional defenses. However, if the FCC institutes *administrative* proceedings, such as the issuance of a cease and desist order, against a microbroadcaster, the microbroadcaster must pursue his constitutional claims through the means given by Congress, which is the administrative process undertaken by the FCC and its review in the D.C. Circuit.") (emphasis added).)

For these reasons, the district court was required to consider petitioners' evidence and actually decide the merits of their constitutional defense – i.e., decide whether the CSA's classification of marijuana in

Schedule I lacks a rational basis and, as applied to petitioners, violates due process. It did not suffice for the district court to advise petitioners to solicit relief from the same Executive Branch that sued them in this case.

D. The Ninth Circuit Refused to Decide Whether or Not the Classification at Issue Currently Has a Rational Basis, and It Failed to Correct the District Court's Refusal to Decide; Instead, the Ninth Circuit Relied on a 30-year-old Opinion That Also Did Not Engage in a Rational-basis Analysis of the Classification.

In their briefs in the Ninth Circuit, petitioners complained of the district court's refusal to decide the merits of petitioners' constitutional defense. The Ninth Circuit, in its three-paragraph rejection of the rational-basis argument, took no notice. After stating its conclusion that the classification satisfies rational-basis review and describing the showing required for a successful rational-basis challenge, the court stated:

> Applying this standard we have previously concluded that the classification of marijuana in Schedule I of the Controlled Substances Act is constitutional. *United States v. Miroyan,* 577 F.2d 489, 495 (9th Cir. 1978). Although, as the Defendants point out, new information has been developed concerning the use of marijuana since 1978, the developments have not "left its central

> holding obsolete." *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 860, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Indeed, the Supreme Court recently reinforced this conclusion by upholding Congressional authority to regulate locally cultivated medical marijuana. *Gonzales v. Raich,* 545 U.S. 1, 9, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). In so doing, the Court stated that it "ha[d] no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class [seriously ill California residents who have been prescribed medical marijuana] . . . compelled an exemption from the CSA; rather, th[is] . . . class of activities . . . was an essential part of the larger regulatory scheme" of the CSA. *Id.* at 26-27.
>
> In sum, *Miroyan* controls this issue and precludes Defendants' rational basis argument.

App. 3-4.

The Ninth Circuit's analysis was seriously flawed, for several reasons. First, this Court's decision in *Gonzales v. Raich* in no way "reinforced" the "conclusion" that there is a rational basis for classifying marijuana in Schedule I. The question in *Raich* was one of the extent of Congress's authority under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) – specifically, whether it included "the power to prohibit the local cultivation and use of marijuana in

compliance with California law." *Raich*, 545 U.S. at 5. This Court, on a six-to-three vote, answered that question in the affirmative, holding that Congress had a rational basis for believing that home-grown medical marijuana in California would affect the interstate marijuana market. *Id.* at 19, 22, 33-34.

Far from purporting to decide the Fifth Amendment due process issue raised in this case – whether or not marijuana's Schedule I classification has a rational basis – the Court in *Raich* "acknowledge[d] that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I." *Raich*, 545 U.S. at 27 n.37. The Court also acknowledged the possibility that "respondents are correct that marijuana does have accepted medical uses and thus should be redesignated as a lesser schedule drug." *Id.* at 27. The instant case, unlike *Raich*, presents the question whether any rational basis currently exists for classifying marijuana as a drug which "has no currently accepted medical use in treatment in the United States." 21 U.S.C.S. § 812(b)(1)(B).

The Ninth Circuit acknowledged that "new information has been developed concerning the use of marijuana since 1978," when *Miroyan* was decided – an understatement, to say the least, given the evidence introduced by petitioners – but went on to

assert that "the developments have not 'left its central holding obsolete.'" App. 4.[10] Notably, the Ninth Circuit offered absolutely nothing in support of that assertion. Moreover, the "central holding" of the two-paragraph rational-basis discussion in *Miroyan* was *not* that the classification of marijuana in Schedule I had a rational basis; it was that the court need not examine the issue, because "'the constitutionality of the marijuana laws has been settled adversely to [defendant] in this circuit.'" *Miroyan*, 577 F.2d at 495 (quoting *United States v. Rogers*, 549 F.2d 107, 108 (9th Cir. 1976)).[11]

United States v. Rogers, the 1976 case quoted in *Miroyan*, also did not decide whether or not the Schedule I classification had a rational basis; it merely stated that the defendants' contention regarding irrationality did not "require[ ] discussion," for the following reason:

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[10] Perhaps needless to say, the source of the quoted phrase, *Planned Parenthood v. Casey*, had nothing to do with marijuana. Moreover, Justice O'Connor's plurality opinion in *Casey* explicitly recognized that a changed state of facts not only justifies, but *requires*, a reexamination of an earlier constitutional holding. 505 U.S. at 863.

[11] In addition to *Rogers*, the Ninth Circuit in *Miroyan* cited two other Ninth Circuit cases for that proposition. *Miroyan*, 577 F.2d at 495. One of those, *United States v. Rodriquez-Camacho*, 468 F.2d 1220 (9th Cir. 1972), is discussed *infra*. The other, *United States v. Lustig*, 555 F.2d 737 (9th Cir. 1977), merely cited *Rogers* and involved cocaine, not marijuana. *Lustig*, 555 F.2d at 750.

> The constitutionality of the marijuana laws has been settled adversely to the appellants in this circuit. *United States v. Rodriquez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972), cert. denied, 410 U.S. 985, 93 S.Ct. 1512, 36 L.Ed.2d 182 (1973); see also *United States v. Kiffer*, 477 F.2d 349, 356-357 (2d Cir. 1973), cert. denied, 414 U.S. 831, 94 S.Ct. 62, 38 L.Ed.2d 65 (1973).

Rogers, 549 F.2d at 108.[12]

United States v. Rodriquez-Camacho, the 1972 Ninth Circuit case on which *Rogers* relied, did not even involve an *assertion* that the classification of marijuana in Schedule I lacked a rational basis. The defendant's constitutional argument in *Rodriquez-Camacho*, which

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[12] The 1973 Second Circuit case cited in *Rogers* (also cited in *Miroyan*) did reject an assertion that the Schedule I classification of marijuana was unconstitutional as irrational and arbitrary; it also stated that there is no "constitutional right to sell marihuana in large quantities, obviously for profit." *United States v. Kiffer*, 477 F.2d at 350. Unlike the Ninth Circuit in the instant case and in *Miroyan* and *Rogers*, the Second Circuit actually engaged in a rational-basis analysis, reviewing in detail the then-available evidence (35 years ago) as to whether or not marijuana was dangerous (although the opinion did not discuss whether or not marijuana had any currently accepted medical use). *Id.* at 352-57. Although the court concluded that, in light of "the ongoing dispute regarding the potential effects of marihuana, we cannot say that its placement in Schedule I is so arbitrary or unreasonable as to render it unconstitutional," the court also stated: "It is apparently true that there is little or no basis for concluding that marihuana is as dangerous a substance as some of the other drugs included in Schedule I." *Id.* at 356-57.

the court rejected, was a Commerce Clause argument; specifically, that Congress "may not constitutionally regulate the intrastate distribution of controlled substances." *Rodriquez-Camacho*, 468 F.2d at 1221.

Thus, in the instant case, even if the Ninth Circuit were correct in saying that none of the many developments concerning medical uses of marijuana in the past thirty years could change the outcome of a rational-basis analysis, no such analysis actually has been performed in any published Ninth Circuit decision. More importantly, new information that has become available in the past thirty years *does* matter, constitutionally speaking:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

United States v. Carolene Products Co., 304 U.S. 144, 153 (1938) (citation omitted).

Both the district court and the Ninth Circuit failed to decide the issue presented by petitioners' constitutional defense: whether any rational basis *currently* exists for the CSA's classification of marijuana as a Schedule I drug. Those courts were not entitled to punt the question to the Executive Branch or to

proclaim the question settled by a thirty-year-old opinion which did not even address the issue on the *then*-current state of facts. That this issue cannot adequately be evaluated with reference only to thirty-year-old facts is demonstrated by the language of the CSA itself; one of the characteristics of a Schedule I drug – the characteristic petitioners emphasized in their filings below – is that the drug has "no *currently* accepted medical use in treatment in the United States." 21 U.S.C.S. § 812(b)(1)(B) (emphasis added).

For the foregoing reasons, this Court should grant certiorari and make clear, for the benefit of the courts below, that a court faced with a rational-basis challenge to a statutory classification must actually determine, based on the evidence put before it, whether or not the classification *currently* has a rational relationship to a legitimate government interest.

II. Whether or Not a Rational Basis Exists for Classifying Marijuana as a Schedule I Drug Is an Important Legal Question That This Court Should Resolve.

The legal issues regarding medical marijuana are currently at the forefront of concerns being addressed on a daily basis by state and federal courts, state and federal legislatures, and hundreds of thousands of physicians, medical patients and citizens. The foundational issue which underlies the plethora of recent litigation is the rationality of the federal government's classification of marijuana as a Schedule I

drug, the schedule reserved for the most dangerous substances. (By way of example, morphine and cocaine, with their extreme potential for abuse, are nonetheless Schedule II substances because of their acknowledged medicinal value.) A contemporary adjudication which addresses head-on whether or not there is currently a rational basis for Congress's scheduling of marijuana is imperative to resolve the national uncertainty.

The number of states which have recognized the efficacy of marijuana in treating certain medical conditions, and which accordingly have made their criminal drug laws inapplicable to certain medical uses of marijuana with a doctor's approval, has grown rapidly since California became the first state to do so in 1996. The purpose of these medical marijuana laws is to alleviate the suffering of severely ill patients for whom no other medication can provide adequate relief. In those instances where federal law-enforcement officials have not (yet) intervened to stop the distribution and use of medical marijuana, many patients have benefited from it, as the evidence presented by petitioners to the district court amply demonstrates.

Yet the patients who need medical marijuana and the caregivers, such as petitioners, who furnish it live under constant threat of raids, prosecution and civil lawsuits (such as the instant case) by the federal government. Doctors cannot prescribe marijuana because of the CSA's Schedule I classification; indeed, the federal government has threatened doctors with

loss of their prescribing privileges for even *recommending* that patients use medical marijuana. *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002).

The Executive Branch repeatedly has demonstrated that the growing body of scientific proof of marijuana's medical efficacy has no effect on the branch's position regarding the scheduling of marijuana. "Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug." *Gonzales v. Raich*, 545 U.S. 1, 15 (2005). Organizations and individuals "have indefatigably sought to obtain a change in marijuana's classification." *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 937 (D.C. Cir. 1991).

As this Court noted in *Gonzales v. Raich*, the campaign to reclassify marijuana – which began almost immediately after the CSA was enacted – has repeatedly failed:

> After some fleeting success in 1988 when an Administrative Law Judge (ALJ) declared that the DEA would be acting in an "unreasonable, arbitrary, and capricious" manner if it continued to deny marijuana access to seriously ill patients, and concluded that it should be reclassified as a Schedule III [sic] substance, the campaign has proved unsuccessful. The DEA Administrator did not endorse the ALJ's findings, and since that time

> has routinely denied petitions to reschedule the drug, most recently in 2001.

Raich, 545 U.S. at 15 n.23 (citation omitted).[13]

No published federal appellate opinion has included a rational-basis analysis based on *recent* developments concerning medical marijuana. Some older cases considered the *then*-current evidence in the context of holding that the Schedule I classification of marijuana did not violate the equal protection and due process components of the Fifth Amendment. For example, *United States v. Kiffer*, 477 F.2d 349 (2d Cir. 1973), reviewed the limited evidence available at the time and noted that, even though the CSA classified marijuana in Schedule I, the criminal penalties for possession of marijuana with intent to distribute were considerably less severe than the penalties for similar possession of other Schedule I and Schedule II drugs such as heroin and cocaine. *Id.* at 353-56. The Second Circuit concluded: "In view of these disparities in the statutory sanctions and the ongoing dispute regarding the potential effects of marihuana, we cannot say that its placement in Schedule I is so

[13] After the DEA's 2001 denial of a petition to initiate rulemaking proceedings to reschedule marijuana, the parties who had unsuccessfully petitioned the DEA filed a petition for review in the D.C. Circuit. *Gettman v. DEA*, 290 F.3d 430, 431-32 (D.C. Cir. 2002). The court declined to address the merits; it held that the parties did not have standing to bring the petition in the D.C. Circuit. *Id.* at 431, 436.

arbitrary or unreasonable as to render it unconstitutional." *Id.* at 356-57.[14]

Some state courts have invalidated their states' own laws that classified marijuana along with "hard drugs." For example, shortly after Congress adopted the CSA, the Illinois Supreme Court held unconstitutional the classification of marijuana with "hard drugs" under that state's Narcotic Drug Act, agreeing with a criminal defendant that marijuana was more akin to the "stimulant or depressant" drugs placed under Illinois's Drug Abuse Control Act, violation of which carried lesser punishment than violation of the Narcotic Drug Act. *People v. McCabe*, 275 N.E.2d 407, 408-09, 412, 414 (Ill. 1971). The court stated that "the classification of marijuana under the Narcotics Drug Act rather than under the Drug Abuse Control Act has been arbitrary." The court noted that marijuana "is not a narcotic and it is not truly addictive. Its use does not involve tolerance, physical dependence or the withdrawal syndrome. Physical ill effects from its use are, so far as is known, relatively moderate." *Id.* at

[14] Other federal cases which rejected rational-basis challenges based on now-outdated evidence concerning the potential dangers and medical benefits of marijuana include *United States v. Greene*, 892 F.2d 453 (6th Cir. 1989); *United States v. Fry*, 787 F.2d 903 (4th Cir. 1986); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982); and *United States v. Fogarty*, 692 F.2d 542 (8th Cir. 1982).

413.[15] The court concluded that it could "not find a rational basis for the classification." *Id.* at 413.

In *People v. Sinclair*, 194 N.W.2d 878 (Mich. 1972), the Michigan Supreme Court unanimously reversed a criminal conviction for possession of marijuana. *Id.* at 879 (per curiam); *id.* (Swainson, J., concurring). Although there was no majority opinion, several justices expressed the view that the state's classification of marijuana as a narcotic was irrational and therefore unconstitutional. *Id.* at 881 (evidence "demonstrates not only that there is no rational basis for classifying marijuana with the 'hard narcotics', but, also, that there is not even a rational basis for treating marijuana as a more dangerous drug than alcohol"); *id.* at 886 (decrying the "murky atmosphere of ignorance and misinformation which casts its pall over the state and Federal legislatures' original classification of marijuana with the hard narcotics"); *id.* at 894 (Williams, J., concurring) ("factually the categorization of marihuana with narcotics and other 'hard drugs' is not a reasonable classification").

Although states may choose – by way of court decisions, legislative enactments, or voter initiatives – to decriminalize the medical use of marijuana, this

[15] The court conceded that marijuana "has no established medical use." *Id.* at 412. Even if this was true in 1971, when *McCabe* was decided, the voluminous evidence adduced by petitioners in the instant case demonstrates that there now *is* established medical use of marijuana.

has no effect on the federal government's power to enforce the CSA with its Schedule I classification of marijuana. Regardless of how a state chooses to classify marijuana – even if, for example, a state were to change its laws to treat marijuana the same as tobacco – federal authorities enforcing federal law have the power to punish and (as in the instant case) enjoin marijuana use and distribution, so long as the Schedule I classification persists.

The instant case has "obvious importance" for the same reason that this Court in *Gonzales v. Raich* so characterized that case: petitioners' "strong arguments that [their clients] will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes." *Raich*, 545 U.S. at 9. This Court should grant certiorari and either decide the rational-basis question itself or remand the case and require the courts below to actually engage in the rational-basis review to which petitioners are entitled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GREG ANTON
(*Counsel of Record*)

MARTIN KASSMAN

Attorneys for Petitioners
Marin Alliance for Medical
Marijuana and Lynnette Shaw

Date: June 12, 2008

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. OAKLAND CANNABIS BUYERS' COOPERATIVE; JEFFREY JONES, Defendants-Appellants.	No. 05-16466 D.C. No. CV-98-00088-CRB MEMORANDUM* (Filed Dec. 13, 2007)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARIN ALLIANCE FOR MEDICAL MARIJUANA; LYNETTE SHAW, Defendants-Appellants.	No. 05-16547 D.C. No. CV-98-00086-CRB

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. UKIAH CANNABIS BUYER'S CLUB; CHERRIE LOVETTE; MARVIN LEHRMAN; MILDRED LEHRMAN, Defendants-Appellants.	No. 05-16556 D.C. No. CV-98-00087-CRB

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted December 4, 2007
San Francisco, California

Before: BRIGHT**, FARRIS, and THOMAS, Circuit Judges.

The Defendants appeal the district court's order permanently enjoining the defendants from distributing or manufacturing marijuana and conducting like activities pursuant to the California Compassionate Use Act of 1996. We affirm. Because the parties are familiar with the factual and procedural history of this case, we need not recount it here.

** The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

I

The district court properly concluded that the placement of marijuana in Schedule I of the Controlled Substances Act satisfies rational basis review. The rational basis standard is a familiar one: courts review challenged legislation with the presumption that it will be found valid unless it bears no rational relationship to a legitimate legislative purpose. *See, e.g., Williamson v. Lee Optical, Inc.,* 348 U.S. 483, 485-88 (1955); *United States v. Carolene Prods. Co.,* 304 U.S. 144, 152-54 (1938). "[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313 (1993). "A statute is presumed constitutional [ ] . . . and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Heller v. Doe,* 509 U.S. 312, 320 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (internal quotation marks omitted) (second alteration in original)). Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Beach Commc'ns,* 508 U.S. at 313.

Applying this standard we have previously concluded that the classification of marijuana in Schedule I of the Controlled Substances Act is constitutional. *United States v. Miroyan,* 577 F.2d 489, 495 (9th Cir. 1978). Although, as the Defendants point

out, new information has been developed concerning the use of marijuana since 1978, the developments have not "left its central holding obsolete." *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 860 (1992). Indeed, the Supreme Court recently reinforced this conclusion by upholding Congressional authority to regulate locally cultivated medical marijuana. *Gonzales v. Raich,* 545 U.S. 1, 9 (2005). In so doing, the Court stated that it "ha[d] no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class [seriously ill California residents who have been prescribed medical marijuana] . . . compelled an exemption from the CSA; rather, th[is] . . . class of activities . . . was an essential part of the larger regulatory scheme" of the CSA. *Id.* at 26-27.

In sum, *Miroyan* controls this issue and precludes Defendants' rational basis argument.

II

The district court also properly concluded that the Oakland Cannabis Buyer's Cooperative ("Cooperative") is not immune from the reach of the Controlled Substances Act pursuant to 21 U.S.C. § 885(d). In *United States v. Rosenthal,* 454 F.3d 943 (9th Cir. 2006), we addressed this issue and concluded that the very ordinance at issue here did not afford immunity to a marijuana cultivator who was an agent of the Cooperative. Although this case does not involve a

cultivator, we cannot draw a principled distinction between our case and *Rosenthal.* In *Rosenthal,* we "reject[ed] the premise that an ordinance such as the one Oakland enacted can shield a defendant from prosecution for violation of federal drug laws." *Id.* at 948 (emphasis omitted). That premise forms the core of the argument here. Therefore, the district court was correct to apply *Rosenthal* and hold that the Cooperative was not immune under § 885(d).

III

The district court also properly rejected the "joint user" defense pursuant to *United States v. Swiderski,* 548 F.2d 445 (2d Cir. 1977). Assuming, without deciding, that we were to adopt *Swiderski* as the operative rule in the Circuit, the rule does not apply to the mass simultaneous acquisition of a drug by numerous individuals. *See United States v. Wright,* 593 F.2d 105, 108 (9th Cir. 1979) (expressing no opinion as to whether *Swiderski* applied in this Circuit, but declining to apply it beyond cases "in which two individuals proceeded together to a place where they simultaneously purchased a controlled substance for their personal use").

IV

Under our deferential standard of review, we see no abuse of the district court's discretion in granting a permanent injunction. Our careful review of the record shows that the district court carefully weighed

all of the relevant equitable factors and correctly analyzed applicable law.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

MARIN ALLIANCE FOR MEDICAL MARIJUANA, and LYNETTE SHAW,

Defendants. /

AND RELATED CASES /

No. C 98-00086 CRB
No. C 98-00087 CRB
No. C 98-00088 CRB

ORDER

(Filed Jun. 6, 2005)

Before issuing an opinion on the merits of defendants' consolidated appeals, the Ninth Circuit remanded these related actions to this Court for reconsideration after the United States Supreme Court issues its decision in *Gonzales v. Raich, cert. granted*, 524 U.S. 936 (2004). *United States v. Marin Alliance for Medical Marijuana*, 372 F.3d 1047 (9th Cir. 2004). *Raich* is a Commerce Clause challenge to federal regulation of intrastate noncommercial cultivation and use of marijuana. In light of the Supreme Court's opinion issued today, *Gonzales v. Raich*, ___ S.Ct. ___, 2005 WL 1321358 (June 6, 2005), the Court declines to reconsider its earlier rulings.

IT IS SO ORDERED.

Dated: June 6, 2005 /s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARIN ALLIANCE FOR MEDICAL MARIJUANA, and LYNETTE SHAW,

Defendants. /

No. C 98-00086 CRB

JUDGMENT; PERMANENT INJUNCTION

(Filed Jun. 10, 2002)

The Court having granted plaintiff's motion for summary judgment by Memorandum and Order filed May 3, 2002, and for the reasons stated in its Memorandum and Order dated June 10, 2002, it is hereby ORDERED that judgment be entered in favor of the United States of America and against defendants Marin Alliance For Medical Marijuana and Lynette Shaw as follows:

1. Defendants Marin Alliance for Medical Marijuana and Lynette Shaw are hereby permanently enjoined from engaging in the distribution of marijuana, the possession of marijuana with the intent to distribute, or the manufacture of marijuana with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1); and

2. Defendants Marin Alliance for Medical Marijuana and Lynette Shaw are hereby permanently

enjoined from using the premises of Suite 210, School Street Plaza, Fairfax, California for the purposes of engaging in the manufacture and distribution of marijuana; and

3. Defendant Lynette Shaw is hereby permanently enjoined from conspiring to violate the Controlled Substances Act, 21 U.S.C. § 841(a)(1) with respect to the distribution of marijuana, the manufacture of marijuana with the intent to distribute, or the possession of marijuana with the intent to distribute.

4. It shall not be a violation of this injunction for defendants to seek and obtain legal advice from their attorneys.

5. Pursuant to Federal Rule of Civil Procedure 65(d), this injunction shall bind the defendants, their officers, agents, servants, employees, successors, and attorneys, and those persons in active concert or participation with them who receive notice of the order by personal service or otherwise.

IT IS SO ORDERED.

Dated: June 10, 2002 /s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATOR'S CLUB, et al., Defendants. /	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **MEMORANDUM AND ORDER**
AND RELATED ACTIONS /	(Filed Jun. 10, 2002)

By Order dated May 3, 2000, the Court granted the government's motion for summary judgment on the ground that it is undisputed that defendants violated the Controlled Substances Act in 1997. Having determined that the government is entitled to judgment, the Court must now determine what remedy, if any, should be imposed. The government seeks a permanent injunction on the same terms as the preliminary injunction.

Standard For A Permanent Injunction

To be entitled to a permanent injunction a plaintiff must actually succeed on the merits. *See Amoco Production Co. v. Village of Gambell,* 480 U.S. 531, 546 n.12 (1987). As the Court previously ruled, the government is entitled to summary judgment on its

claim that the clubs distributed marijuana in violation of the Controlled Substances Act.

The government must also show that it has no adequate legal remedy. *See Continental Airlines v. Intra Brokers, Inc.,* 24 F.3d 1099, 1102 (9th Cir. 1994). Irreparable injury is one basis for showing the inadequacy of the legal remedy. *See id.* The Ninth Circuit has held that in statutory enforcement actions, such as this, irreparable injury is presumed. *See Miller v. California Pacific Medical Center,* 19 F.3d 449, 459 (9th Cir. 1994) (en banc); *see also* 5 F.Supp.2d at 1103 (same). If there is no threat of future wrongful conduct, however, a legal remedy will be adequate. To put it another way, the purpose of a permanent injunction is not punishment but rather deterrence of future behavior. *See Orantes-Hernandez v. Thornburgh,* 919 F.2d 549, 564 (9th Cir. 1990) ("Permanent injunctive relief is warranted where . . . defendant's past and present misconduct indicates a strong likelihood of future violations.").

That the government has succeeded on the merits and is entitled to a presumption of an inadequate legal remedy does not require the Court to enter a permanent injunction. When the United States Supreme Court reviewed the preliminary injunction order in this case, it held that "[b]ecause the District Court's use of equitable power is not textually required by any 'clear and valid legislative command,' the court did not have to issue an injunction." 121 S.Ct. at 1721. The Court explained further that

> the mere fact that the District Court had discretion does not suggest that the District Court, when evaluating the motion to modify the injunction, could consider any and all factors that might relate to the public interest or the conveniences of the parties, including the medical needs of the Cooperative's patients. . . . A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. . . . Their choice . . . is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all. Consequently, when a court of equity exercises its discretion, it may not consider the advantages and disadvantages of nonenforcement of the statute, but only the advantages and disadvantages of "employing the extraordinary remedy of injunction.". . . . To the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms.

Id. at 1721-22. The Supreme Court thus held that this Court cannot decline to enter an injunction pursuant to 21 U.S.C. section 882(d) because the Court believes seriously ill individuals should be permitted to legally obtain marijuana from the clubs. The Court can decline to enter a permanent injunction only if enforcement by some other means, here,

criminal prosecution, is more appropriate than the requested equitable relief.

DISCUSSION

The first issue is whether the government has demonstrated a threat of future unlawful conduct. If not, there is no need for the Court to exercise its extraordinary equitable powers for there is no conduct to deter. The government has met its burden. The clubs are still in existence and their very purpose is to distribute marijuana to seriously ill patients.

At the beginning of this case, one of the defendant clubs, Flower Therapy, voluntarily closed its doors and agreed to stop distributing marijuana. In light of its conduct and its representation to the Court, the club no longer posed a threat of future unlawful conduct. Accordingly, the Court dismissed the government's case against this club. In connection with the motion for a permanent injunction, the Court gave all of the remaining defendant clubs the opportunity to present evidence that they, too, do not pose a threat of future unlawful conduct, that is, distribution of marijuana. None of the clubs came forward with such evidence or even the suggestion that they would not distribute marijuana in the absence of an injunction. After considering all the evidence presented by the government, the Court finds that in the absence of an injunction, the defendants are likely to resume distributing marijuana in violation of the Controlled Substances Act.

The critical issue then is whether, in light of the available criminal enforcement remedy, the Court should decline to enter a permanent injunction. The government first argues that because it has chosen to proceed by means of civil enforcement, the Court does not have discretion to not impose the injunction; in other words, for the Court to decline to issue the injunction in favor of criminal prosecution would be tantamount to declining to enforce the statute at all since the government has not initiated criminal proceedings. If the government is correct, however, the government – not the district court – would ultimately exercise the discretion as to whether to issue the injunction; the government could limit the district court's discretion by simply not initiating criminal proceedings. The Supreme Court, however, specifically rejected this outcome: "the District Court in this case had discretion." *Oakland Cannabis Buyer's Cooperative,* 531 U.S. 496. "[W]ith respect to the Controlled Substances Act, criminal enforcement is an alternative, and indeed the customary, means of ensuring compliance with the statute. Congress' resolution of the policy issues can be (and usually is) upheld without an injunction." *Id.* at 497.

Thus, the fact that the government has not chosen to proceed criminally does not require the Court to enter a permanent injunction; rather, the Court should consider the advantages and disadvantages of "employing the extraordinary remedy of injunction," and "[t]o the extent the district court considers the public interest and the conveniences of

the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms," namely, criminal prosecution. *Id.* at 497-98.

Defendants contend that the Court should not proceed with civil enforcement because the procedural protections are not as great as in a criminal prosecution. For example, if the government charges a defendant with violating the injunction, the defendant does not have a right to a jury trial in the absence of a genuine dispute of fact, and the burden of proof is less exacting; the government need only prove the violation by a preponderance of the evidence rather than beyond a reasonable doubt.

The reduced procedural protections available in a civil proceeding might be a reason to decline civil enforcement in certain circumstances. For example, if there is a genuine dispute as to whether a defendant is in fact violating the law, a court might decide that criminal enforcement – with its more vigorous burden of proof – is a more appropriate method of enforcement. But those are not the circumstances here. Defendants do not deny that they distributed marijuana; there is no genuine factual dispute as to their violation of the law. Defendants simply disagree with the law.

Moreover, the reduced procedural protections available in a civil case reflect the far less serious consequences of a judgment in favor of a plaintiff in

a civil proceeding. The result of the government prevailing here is that the clubs will be enjoined from distributing marijuana. In a criminal case the clubs may still be shut down, but in addition, the individual defendants may lose their liberty. Given the amount of marijuana distributed by the clubs, the potential prison time faced by the individual defendants under the United States Sentencing Guidelines is significant.[1] Furthermore, the fact that defendants were distributing marijuana to seriously ill patients is not a defense. *See Oakland Cannabis Buyer's Cooperative,* 532 U.S. at 494-95. It is thus unsurprising that at oral argument counsel for defendants Marin Alliance for Medical Marijuana and Lynette Shaw stated that these defendants prefer that the Court and the government proceed with a civil injunction rather than criminal prosecution.

Defendants also argue that a civil injunction interferes with the rights of seriously ill patients. A criminal prosecution of the clubs and its leaders,

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[1] For example, assuming an individual defendant does not have any prior criminal history, and is convicted of distributing, or aiding and abetting the distribution of, 10 kilograms of marijuana, he would fall within a sentencing range of 21 to 27 months. U.S.S.G. § 2D1.1(c). A conviction involving 80 kilograms of marijuana would result in a sentence of almost five years. *Id.* Moreover, under the Controlled Substances Act certain mandatory minimum sentences apply: a conviction involving 100 or more marijuana plants regardless of weight carries a five-year minimum sentence, 21 U.S.C. § 841(b)(1)(B)(vii), and a conviction involving 1000 such plants requires a 10-year minimum sentence. 21 U.S.C. § 841(b)(1)(A)(vii).

however, would do the same. This Court cannot decline to issue the injunction in favor of non-enforcement of the statute. *See Oakland Cannabis Buyer's Cooperative* 532 U.S. 483 at 498 ("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. Their choice . . . is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all.").

CONCLUSION

In light of the serious penalties faced by the individual defendants in a criminal proceeding and the unavailability of a medical necessity defense, the Court concludes in its discretion that civil enforcement of the Controlled Substances Act in the circumstances of these related cases is appropriate. Accordingly, the Court will issue permanent injunctions in these related actions enjoining defendants from the distribution of marijuana in violation of the Controlled Substances Act.[2]

[2] Plaintiff filed these related actions to enjoin the distribution of marijuana, not possession for personal use. The issue of personal use is not before the Court and the Court declines to reach that issue.

IT IS SO ORDERED.

Dated: June 10, 2002 /s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATOR'S CLUB, et al., Defendants. /	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **MEMORANDUM AND ORDER**
AND RELATED ACTIONS /	(Filed May 3, 2002)

In February 1998, the government filed the above-related lawsuits alleging that defendants manufacture and distribute marijuana in violation of 21 U.S.C. section 841(a)(1), among other statutes. The government seeks an injunction pursuant to 21 U.S.C. section 882(a) permanently enjoining defendants' conduct. Now before the Court is the government's motion for summary judgment and entry of the permanent injunction. Defendants move to dissolve the preliminary injunction. This Memorandum and Order addresses the government's motion for summary judgment. The issue is whether there is a genuine dispute as to defendants' violation of the Controlled Substances Act ("CSA") in 1997.

PROCEDURAL HISTORY

The government originally filed suit against six marijuana distribution clubs and various individuals associated with those clubs. One of the clubs, Flower Therapy Medical Marijuana Club, voluntarily ceased operations. Accordingly, the court dismissed that case (98-0089) without prejudice.

The Court subsequently granted the government's motion for a preliminary injunction in the remaining cases on the ground the government had demonstrated a likelihood of success on the merits and irreparable harm. *See United States v. Cannabis Cultivator's Club*, 5 F.Supp.2d 1086 (N.D. Cal. 1998). Defendants unsuccessfully moved the Court to modify the preliminary injunction to exclude distributions of marijuana that are medically necessary. After the Ninth Circuit ruled that the medical necessity defense is legally cognizable and should have been considered in the district court, the Supreme Court granted certiorari. The Supreme Court reversed and held that medical necessity is not a defense to manufacturing and distributing marijuana. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494-95 (2001).

The government now moves for summary judgment in the remaining cases: 98-0085 (Cannabis Cultivator's Club and Dennis Peron ("CCC"); 98-0086 (Marin Alliance for Medical Marijuana and Lynette Shaw) ("Marin Alliance"); 98-0087 (Ukiah Cannabis Club, Cherrie Lovette, Marvin Lehrman, and Mildred

Lehrman) ("Ukiah Club"), 98-0088 (Oakland Cannabis Buyers' Cooperative and Jeffrey Jones) ("OCBC"), and 98-245 (Santa Cruz Buyers' Club) ("Santa Cruz Club"). The OCBC defendants filed a written opposition to the government's motion, in which the Marin Alliance, Ukiah Club and CCC defendants joined. The Santa Cruz Club has not filed an opposition to the government's motion nor joined in the OCBC's opposition.

THE GOVERNMENT'S EVIDENCE

In support of its motion for summary judgment, the government relies on the evidence it submitted in support of its motion for a preliminary injunction. This evidence consists primarily of the affidavits of undercover agents who purchased marijuana from the defendants in 1997. The evidence as to each of the clubs is summarized below.

1. CCC (98-0085)

The government has submitted the affidavits of Drug Enforcement Agency ("DEA") agents who purchased marijuana from the CCC on May 21, 1997, June 20, 1997, August 6, 1997, September 12, 1997, October 24, 1997, and November 5, 1997. For example, Special Agent Brian Nehring declares that on May 21, 1997 he went to the Cannabis Cultivator's Club located at 1444 Market Street in San Francisco, California. He brought with him a falsified physician

statement stating that he suffered from "Post Traumatic Stress Disorder." At the Club he was asked to fill out a form, his physician statement was examine, and he was issued a membership card. He was then directed to the third floor, which was a room with two sales counters. One of the counters was staffed by 4-5 persons, and there were several menu boards on the wall listing grades of marijuana with prices ranging from $25 to $90 per one-eighth ounce. He paid $25 for one-eighth ounce of what the Club identified as Mexican-grown marijuana. Senior Forensic Chemist Phyllis E. Quinn has submitted an affidavit attesting that the substances purchased by Nehring and the other undercover agents are marijuana.

2. Ukiah Club (98-0087)

The government has submitted the affidavits of undercover agents who purchased marijuana from the Ukiah Club on June 5, 1997, June 30, 1997, August 5, 1997, September 9, 1997, October 24, 1997, and November 14, 1997. For example, Special Agent Bill Nyfeler attests that on June 30, 1997 he went to the Ukiah Club located at the Forks Theater, 40A Pallini Lane, Ukiah, California. He brought with him a Ukiah Club membership card belonging to Special Agent Nehring, and a "Primary Caregiver" form. When he entered the Club, an unidentified man examined the membership card and Nyfeler's identification and noted that they did not match. Nyfeler explained he was a primary caregiver and provided the man with the form. An adult female identified as

"Cherri" then asked Nyfeler about his membership status. Nyfeler again explained he was a primary caregiver. After Nyfeler signed the membership card in Cherri's presence, Nyfeler went to the sales counter and paid $25 for what was identified as Mexican-grown marijuana. The government has again submitted the affidavit of Senior Forensic Chemist, Phyllis E. Quinn who attests that the substances purchased at the Club were marijuana.

3. OCBC (98-0088)

The government has submitted the affidavits of undercover agents who purchased marijuana from the OCBC on May 19, 1997, June 23, 1997, August 8, 1997, and October 22, 1997. Senior Forensic Chemist, Phyllis E. Quinn examined the substances purchased at the Club and confirms they were marijuana. The undercover agents also observed marijuana plants being grown in the OCBC.

The government also relies on the evidence submitted in support of its motion for civil contempt. After the Court issued its preliminary injunction, the OCBC held a press conference at the Club during which it distributed marijuana in front of television cameras. *See* October 13, 1998 Order of Contempt in 98-0088; *see also Oakland Cannabis Buyers' Cooperative*, 532 U.S. at 487 ("The Cooperative did not appeal the injunction but instead openly violated it by distributing marijuana to numerous persons.").

4. Marin Alliance (98-0086)

The government has submitted the affidavits of undercover agents who purchased marijuana from the Marin Alliance on June 2, 1997, June 30, 1997, August 5, 1997, September 9, 1997, and October 24, 1997. Senior Forensic Chemist Phyllis E. Quinn examined the substances purchased at the Club and confirms they were marijuana.

For example, Special Agent Deborah Muusers attests that on October 24, 1997, she went to the Marin Alliance located at 6 School Street Plaza, Suite 210, in Fairfax, California and brought with her a phony physician statement which stated that Muuser suffered from "menstrual cramps." A person who identified himself as Ken asked to see Muuser's identification and physician's statement. He then asked her to fill out some forms. She listed "menstrual cramps" as the reason she wished to purchase marijuana. After waiting approximately 15 minutes, Muuser was advised that she had a provisional membership.

Muuser then entered a room where a person identified as "Rob" was seated. Rob pointed to a menu board with various prices that ranged from $40 for low grade and "Thai" marijuana to $54 for the various high grades. Muuser purchased one-eighth ounce of "82J" for $65.00.

5. Santa Cruz Club (98-0245)

The government has submitted the affidavits of undercover agents who purchased marijuana from the Santa Cruz Club, located at 201 Maple Street, Santa Cruz, California, on May 19, 1997, June 23, 1997, August 8, 1997, September 10, 1997, October 24, 1997, and November 5, 1997. Senior Forensic Chemist, Phyllis E. Quinn examined the substances purchased at the Club and confirms they were marijuana.

DISCUSSION

I. The Motion For Summary Judgment

A. Summary Judgment Standard

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is "material" only if it could affect the outcome of the suit under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A principal purpose of the summary judgment procedure "is to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). "Where the record taken as a whole could not lead a rational

trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

"In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all reasonable inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). An inference may be drawn in favor of the non-moving party, however, only if the inference is "rational" or "reasonable' under the governing substantive law. *See Matsushita*, 477 U.S. at 588.

B. Defendants' Arguments

Defendants do not directly challenge the government's evidence through submission of their own evidence, that is, they do not offer any evidence suggesting that they did not distribute marijuana on the dates allegedly by the government. Instead, they make various legal arguments, including a challenge to the sufficiency of the government's evidence.

1. The sufficiency of the government's evidence

Defendants first contend the government cannot base its motion for summary judgment on evidence submitted in support of the motion for a preliminary injunction. Defendants do not cite any case or rule

which supports this proposition. This is unsurprising as the federal rules do not require a party to re-submit evidence already filed in connection with a motion for a preliminary injunction. *See Air Line Pilots Ass'n., Inc. v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1397 n.4 (9th Cir. 1990) ("A district court might also convert a decision on a preliminary injunction into a final disposition of the merits by granting summary judgment on the basis of the factual record available at the preliminary injunction stage.").

They next argue the government agents' affidavits are inadmissible and have submitted a "Separate Statement Of Objections." In sum, they claim the agents "entrapped" defendants into distributing marijuana because defendants "were not predisposed to providing cannabis to persons without the proper authorization." Since the Supreme Court has unanimously and definitively ruled that it is unlawful to distribute marijuana regardless of the medical need of the recipient, *see Oakland Cannabis Buyers' Cooperative*, 532 U.S. at 494-95, any "proper authorization" is irrelevant. With or without medical authorization the distribution of marijuana is illegal under federal law. Defendants' other objections are equally without merit. The declarations were made on the basis of personal knowledge and are admissible.

Finally, defendants move to continue the summary judgment motion pursuant to Federal Rule of Civil Procedure Rule 56(f) to permit them to conduct discovery. They seek to depose the agents as well as

discover evidence of the government's "blocking" research into the medical benefits of marijuana. "Federal Rule of Civil Procedure 56(f) provides that if a party opposing summary judgment demonstrates a need for further discovery in order to obtain facts essential to justify the party's opposition, the trial court may deny the motion for summary judgment or continue the hearing to allow for such discovery. In making a Rule 56(f) motion, a party opposing summary judgment "must make clear what information is sought and how it would preclude summary judgment." *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998) (quoting *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987)).

Defendants have not met their Rule 56(f) burden. If they did not sell marijuana, they are in the possession of such evidence, namely, declarations stating that they did not sell any marijuana to the undercover agents on the particular dates. Moreover, they have not offered any explanation as to why the deposition of the agents would lead to evidence precluding summary judgment; for example, they have not explained why the agents' personal recollection of buying marijuana is suspect, especially given their failure to offer any evidence suggesting that the agents did not in fact purchase marijuana from defendants. The Court is also unpersuaded that discovery into the government's history with respect to marijuana research will produce evidence legally relevant to the issues presented by the government's motion for summary judgment.

2. Defendants' legal defenses

Most of the legal defenses raised by defendants were made in opposition to the motion for preliminary injunction or in connection with other motions in these related actions. The Court will address the merits of such defenses to the extent defendants offer argument or evidence that was not previously rejected by the Court.

a. 21 U.S.C. section 885(d) immunity

Defendants repeat their contention that they are entitled to immunity under section 885(d), a statute intended to provide immunity for undercover law enforcement operations. The Court previously rejected this argument, *see* Order Re: Motion To Dismiss In Case No. 98-0088 (Sep. 1998), and defendants offer nothing new.

b. The joint user and ultimate user defenses

Defendants renew their "joint user" defense under *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977), and their related "ultimate user" defense. The Court previously rejected these arguments, *see Cannabis Cultivator's Club*, 5 F.Supp.2d at 1100-01, and defendants have not offered any new evidence or argument. Based on the evidence before the Court, no reasonable trier of fact could find that defendants' sale of marijuana was legal based on these defenses. The sale of marijuana to the undercover agents does

not, under any reasonable interpretation of the law, fall within the *Swiderski* exception to distribution.

c. Substantive due process

The Court previously rejected defendants' argument that the CSA as applied to their distribution of medical marijuana violates their substantive due process rights. *See Cannabis Cultivator's Club*, 5 F.Supp.2d at 1102-03. The Court concluded that defendants had not established that they have a fundamental right to distribute medical marijuana. In their opposition to summary judgment defendants still have not established such a fundamental right; instead, they assert that the persons to whom they distribute marijuana have a fundamental right to treat themselves with medical marijuana. Again, the Court previously rejected this argument with respect to the intervener club members. *See United States v. Cannabis Cultivator's Club*, 1999 WL 111893 (N.D. Cal. Feb. 25, 1999). Moreover, defendants have not established that they have standing to assert that a judgment in the government's favor against defendants would violate the fundamental rights of the non-defendant club members, *see* 5 F.Supp.2d at 1103; indeed, in *Oakland Cannabis Buyer's Cooperative* Justice Stevens noted that the clubs cannot assert a necessity defense based on the club members' suffering because it is the club members, not the clubs themselves, that face the choice of evils. *Oakland Cannabis Buyer's Cooperative*, 532 U.S. at 500 n.1 (Stevens, J., concurring).

Defendants' contention that the CSA as applied to them violates their Due Process rights under a rational-basis review also does not defeat summary judgment. Under rational-basis review, the Court must presume the statute is valid and uphold it "if it is rationally related to a legitimate government interest." *Rodriguez v. Cook*, 169 F.3d 1176, 1181 (9th Cir. 1999).

The statute as issue here – the CSA – places drugs into five schedules, which impose different restrictions on access to the drugs. Congress placed marijuana in Schedule I, the most restrictive schedule. A Schedule I drug (1) has a high potential for abuse, (2) has no currently accepted medical use in treatment in the United States, and (3) has a lack of accepted safety for use of the drug . . . under medical supervision. *See* 21 U.S.C. § 812(b)(1). The CSA permits the Attorney General "to reschedule a drug if he finds that it does not meet the criteria for the schedule to which it has been assigned." *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1133 (D.C. Cir. 1994) (citing 21 U.S.C. § 811(a)). The Attorney General has delegated this authority to the Administrator of the DEA, who in turn has adopted guidelines for determining if a drug has currently accepted medical use in the United States. Members of the public may petition the Administrator to reschedule a particular drug, including marijuana. *See, e.g., Alliance for Cannabis Therapeutics*, 15 F.3d at 1133.

The Court must consider this entire statutory scheme in determining whether there is a rational basis for the CSA's prohibition on the manufacture and distribution of marijuana for any purpose. In light of the available statutory procedure for reviewing the appropriateness of the current classification of marijuana, the Court cannot conclude that the CSA's prohibition on the distribution of marijuana is not rationally related to a legitimate government purpose, namely, to limit the distribution of drugs with a high potential for abuse. Defendants' challenge to the appropriateness of the classification of marijuana must be made to the DEA Administrator, not this district court. To hold otherwise would allow defendants and others to make an "end run" around the process Congress implemented to ensure that drugs are properly classified.

C. Evidentiary hearing

Defendants complain that before they are permanently enjoined from distributing marijuana they should be given an evidentiary hearing on the merits of their defenses. They claim that "in the two cases where Section 882 was used to enjoin criminal activity under the CSA, the defendants were at least given a hearing at which they could challenge the government's evidence and present their own. *See United States v. Barbacoff*, 416 F.Supp. 606, 607 (D.D.C. 1976); *United States v. Williams*, 416 F.Supp. 611 (D.D.C. 1976). They assert that the evidentiary hearings in those cases were held before the court

granted partial summary judgment in favor of the government.

Defendants' reliance on these cases is misplaced. Both cases involved whether the defendant pharmacists were knowingly filling forged prescriptions for controlled substances. Thus, presumably there was a factual dispute as to defendants' knowledge, and a trial-like hearing was necessary to resolve that dispute. Moreover, defendants misrepresent the procedural posture of the cases. In both cases the hearing with cross-examination was held *after* the court granted partial summary judgment; indeed, in one of the cases, the court expressly states the purpose of the hearing was to determine the penalty, that is, how much the defendant would pay. *Williams*, 416 F.Supp. 612. Defendants have not offered any evidence from which a reasonable trier of fact could conclude defendants did not distribute marijuana; accordingly, no evidentiary hearing or trial is needed to resolve disputed issues of fact.

II. Commerce Clause

"Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Defendants contend neither the Commerce Clause nor any other Constitutional provision gives Congress the power to prohibit their intrastate manufacture and distribution of medical marijuana. Although defendants do not raise this

issue as a defense to the government's motion for summary judgment, the Court will address the argument in this Memorandum.

In connection with the preliminary injunction motion, the Court held that Congress could regulate the wholly-intrastate manufacture and distribution of marijuana under the Commerce Clause. *See* 5 F.Supp.2d at 1096-97. Since the Court's ruling, the Supreme Court held that Congress did not have Commerce Clause authority to enact the civil remedy provision of the Violence Against Women Act ("VAWA"). *See Morrison*, 529 U.S. at 617-18. Defendants claim that under *Morrison* federal regulation of the purely intrastate manufacture and distribution of medical marijuana cannot emanate from the Commerce Clause.

Morrison does not support defendants' argument. The civil remedy provisions of the VAWA did not involve the regulation of intrastate commerce; instead, Congress attempted to justify the law on the basis of the interstate commerce effects of intrastate violence against women. In reaching this decision, the *Morrison* Court observed that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." 529 U.S. at 611. It then concluded that the civil remedy provisions of VAWA could not be enacted pursuant to the Commerce Clause because

> [g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.

> While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

Id. at 613.

Unlike violence, the manufacture and distribution of marijuana is economic activity; indeed, the Ninth Circuit has specifically held that "drug trafficking is a commercial activity which substantially affects interstate commerce" *United States v. Staples*, 85 F.3d 461, 463 (9th Cir. 1996); *see also United States v. Tisor*, 96 F.3d 370, 375 (9th Cir. 1996) (noting that the Ninth Circuit has adopted the Eighth Circuit's reasoning that intrastate drug activity affects interstate commerce . . . ; that Congress may regulate both interstate and intrastate drug trafficking under the Commerce Clause, . . . and that section 841(a)(1) is a valid exercise of Congress's Commerce Clause power.") (internal quotations omitted). The Court is bound by these rulings in the absence of a subsequent Supreme Court case casting the Ninth Circuit's holdings in doubt. As *Morrison* did not involve intrastate commerce, it is not such a case.

CONCLUSION

For the foregoing reasons, the Court concludes that based on the record before the Court there is no

genuine material dispute that defendants violated the CSA several times in 1997 by distributing marijuana and possessing marijuana with the intent to distribute. Accordingly, the government's motion for summary judgment is GRANTED.

Having granted the government's motion, the Court must decide what remedy, if any, is appropriate. The government seeks entry of a permanent injunction on the same terms as the preliminary injunction. At oral argument the Court advised the parties that should the Court grant the government's motion for summary judgment, it would give defendants the opportunity to file further submissions with the Court concerning the likelihood of future violations of the Act, and in particular, whether there is a threat that defendants, or any of them, will resume their distribution activity if the Court does not enter a permanent injunction. All such submissions, if any, shall be field by May 24, 2002 and the government's response, if any, shall be field by June 7, 2002. The Court will take the matter of the remedy to be imposed under submission at that time.

IT IS SO ORDERED.

Dated: May 3, 2002 /s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES, Plaintiff, v. CANNABIS CULTIVATOR'S CLUB, et al., Defendants. / and Related Cases. /	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **ORDER IN CASE NO. 98-00086 (Marin Alliance for Medical Marijuana)** (Filed Dec. 3, 1998)

Now before the Court is defendants' motion for reconsideration of the Court's October 13, 1998 Order denying defendants' motion to dismiss. In particular, defendants ask the Court to reconsider its decision denying defendants' "rational basis" challenge to the Controlled Substances Act's prohibition on the manufacture and distribution of marijuana on the ground that the Court does not have jurisdiction to hear such a challenge. After carefully considering the papers submitted by the parties, the motion for reconsideration is DENIED.

To the extent the Court has jurisdiction to hear defendants' rational basis challenge, the Court must nevertheless reject defendants' argument because the Ninth Circuit has previously determined that the Controlled Substances Act's restrictions on the manufacture and distribution of marijuana are rational.

See United States v. Miroyan, 577 F.2d 489, 495 (9th Cir. 1978). Indeed, the *Miroyan*, court stated that it "need not again engage in the task of passing judgment on Congress' legislative assessment of marijuana. As we recently declared, '[t]he constitutionality of the marijuana laws has been settled adversely to [the defendant] in this circuit.'" *Id.*

Since the Ninth Circuit, and indeed every Circuit that has addressed the issue, has held that the classification of marijuana as a Schedule I Controlled Substance is rational and therefore constitutional, defendants' proffered evidence on the medical benefits of marijuana is an argument that in light of the scientific evidence available today, the continuing classification of marijuana as a Schedule I drugs is irrational; that is, that the government does not presently have a legitimate interest in prohibiting the medial use of marijuana.

No matter how defendants frame their argument, however, it is in essence an argument that this Court should reclassify marijuana because there is no substantial evidence to support its current classification. As the Court stated in its October 13, 1998 Order, when Congress enacted the Controlled Substances Act it

> established a statutory framework under which controlled substances may be rescheduled or removed from the schedules all together. *See* 21 U.S.C. § 811(a). Under this statutory framework, the Attorney General may by rule transfer a substance between

> schedules or remove a substance from the schedules all together. *See id.* § 811(a). In addition, any interested party can file a petition with the Attorney General to have substance, including marijuana, rescheduled or removed from the schedules. *See id.* The petitioner may appeal a decision not to reschedule a substance to the courts of appeal. *See* 21 U.S.C. § 877; *see also Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131, 1137 (D.C. Cir. 1994) (upholding decision not to reschedule marijuana). Review of the Attorney General's decision as to the classification of a controlled substance is limited to the District of Columbia Court of Appeals or the circuit in which petitioner's place of business is located. *See* 21 U.S.C. § 877.

October 13 Order at 8-9. Thus, Congress gave the Attorney General the exclusive authority to determine the reclassification of marijuana in the first instance, with appeal to the Court of Appeals. As the Seventh Circuit has held, "[t]he Act authorizes the Attorney General to reclassify a drug if presented with new scientific evidence. . . . We agree that this mechanism, and not the judiciary, is the appropriate means by which defendant should challenge Congress' classification of marijuana as a Schedule I drug." *United States v. Greene*, 892 F.2d 453, 455 (7th Cir. 1989); *see also United States v. Burton*, 894 F.2d 188, 191 (6th Cir. 1990) ("it has been repeatedly determined, and correctly so, that reclassification is clearly a task for the legislature and the attorney

general and not a judicial one"); *United States v. Wables*, 731 F.2d 440, 450 ("we hold that the proper statutory classification of marijuana is an issue that is reserved to the judgment of Congress and to the discretion of the Attorney General"). Accordingly, defendants' motion for reconsideration is DENIED.

IT IS SO ORDERED.

Dated: December 3, 1998

/s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. OAKLAND CANNABIS BUYERS' COOPERATIVE; et al., Defendants-Appellants.	No. 05-16466 D.C. No. CV-98-00088-CRB ORDER (Filed Mar. 14, 2008)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARIN ALLIANCE FOR MEDICAL MARIJUANA; et al., Defendants-Appellants.	No. 05-16547 D.C. No. CV-98-00086-CRB

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. UKIAH CANNABIS BUYER'S CLUB; et al., Defendants-Appellants.	No. 05-16556 D.C. No. CV-98-00087-CRB

Before: BRIGHT*, FARRIS, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Farris and Thomas voted to reject the suggestion for rehearing en banc and Judge Bright so recommended.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

PERTINENT TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

21 U.S.C.S. § 802 (in pertinent part):

As used in this title: . . .

> (6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this title [21 USCS § 812]. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1954 [26 USCS §§ 5001 et seq.].

* * *

21 U.S.C.S. § 811 (in pertinent part):

(a) Rules and regulations of Attorney General; hearing. The Attorney General shall apply the provisions of this title to the controlled substances listed in the schedules established by section 202 of this title [21 USCS § 812] and to any other drug or other substance added to such schedules under this title. Except as provided in subsections (d) and (e), the Attorney General may by rule –

(1) add to such a schedule or transfer between such schedules any drug or other substance if he –

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 202 [21 USCS § 812(b)] for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of title 5 of the United States Code [5 USCS §§ 551 et seq.]. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General

(1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

(b) Evaluation of drugs and other substances. The Attorney General shall, before initiating proceedings under subsection (a) to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation and recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant

control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a).

(c) Factors determinative of control or removal from schedules. In making any finding under subsection (a) of this section or under subsection (b) of section 202 [21 USCS § 812(b)], the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this title.

* * *

21 U.S.C.S. § 812 (in pertinent part):

(a) Establishment. There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this title [enacted Oct. 27, 1970] and shall be updated and republished on an annual basis thereafter.

(b) Placement on schedules; findings required. Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) SCHEDULE I.

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) SCHEDULE II.

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) SCHEDULE III.

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) SCHEDULE IV.

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) SCHEDULE V.

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

(c) Initial schedules of controlled substances [Caution: For amended schedules, see 21 CFR Part 1308.]. Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 201 [21 USCS § 811], consist of the following drugs or other substances, by

whatever official name, common or usual name, chemical name, or brand name designated:

SCHEDULE I

(a) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation: . . .

(b) Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation: . . .

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation: . . .

(10) Marihuana. . . .

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21 U.S.C.S. § 841 (in pertinent part):

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.